

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

Joseph David Reddy,)	CASE NO. 1:12 CV 57
)	
Petitioner,)	JUDGE PATRICIA A. GAUGHAN
)	
vs.)	
)	
Bennie Kelly, Warden,)	<u>Memorandum of Opinion and Order</u>
)	
Respondent.)	

Introduction

This matter is before the Court upon the Report and Recommendation of Magistrate Judge Baughman, Jr. (Doc. 11) which recommends dismissal and denial of the Petition for Writ of Habeas Corpus pending before the Court. Petitioner filed Objections to the Report and Recommendation. For the following reasons, the Report and Recommendation is ACCEPTED.

Standard of Review

Rule 8(b) of the Rules Governing Section 2254 Cases in the United States District Courts provides, “The judge must determine *de novo* any proposed finding or recommendation to which objection is made. The judge may accept, reject, or modify any proposed finding or

recommendation.”

Discussion

Petitioner is incarcerated following his conviction at a bench trial in the Cuyahoga County Common Pleas Court of one count of aggravated murder. Petitioner was re-sentenced in 2010 after the appeals court modified his conviction to one count of murder. Petitioner strangled his mother, who had a history of violence against him, after she confronted him in his bedroom and threatened him with a knife.

Petitioner asserted three grounds for habeas relief. The Magistrate Judge determined that none of the grounds survive AEDPA review. This Court agrees.

In ground one, petitioner argues that the trial court abused its discretion by failing to consider the lesser degree offense of homicide given that petitioner was prevented from presenting evidence that the killing happened in a sudden fit of rage. As the Magistrate Judge pointed out, the appellate court’s decision makes clear that the evidence of the attack by petitioner’s mother was in the record, was not excluded, and was the basis for the lesser conviction of murder. Petitioner faults the appellate court for failing to remand the matter for a new trial, rather than reduce the conviction, so as to give him an opportunity to further mitigate the charge. But, as correctly recognized by the Magistrate Judge, the appellate court’s function is to reduce a conviction to a lesser offense based on evidence already in the record rather than order a new trial. Ground One has no merit and petitioner’s objections are unavailing.

In ground two, petitioner asserts ineffective assistance of trial counsel. The Court agrees with the Magistrate Judge’s conclusion that the court of appeals decision was not contrary to *Strickland v. Washington*, 466 U.S. 668 (1984), or an unreasonable application of that case. In

particular, there was no prejudice in not having a witness testify given that there was other evidence in the record which covered his proposed testimony that petitioner's mother was the aggressor in coming at petitioner with a knife. Nor was the admission of photographs prejudicial, and the lack of evidence of PTSD did not render the result of the proceeding different given the extensive evidence in the record of petitioner's mother's abuse.

The Magistrate Judge likewise correctly concluded that ground three should be denied. This ground asserted that the trial court violated petitioner's right against self-incrimination when it stated that petitioner could not explain the blood spatter on the walls of the house. The appellate court was not unreasonable in finding that the trial court's comments were not about petitioner's failure to testify but about defense counsel's failure to address all the evidence presented. Additionally, the trial court's comments would have been harmless given that the spatter evidence was intended to prove aggravated murder which the appellate court rejected.

For these reasons, and those stated in the Report and Recommendation which is incorporated herein, the Petition for Writ of Habeas Corpus is denied.

Conclusion

Accordingly, the Report and Recommendation is accepted. The Petition for Writ of Habeas Corpus is dismissed and denied. Furthermore, for the reasons stated herein and in the Report and Recommendation, the Court certifies, pursuant to 28 U.S.C. § 1915(a)(3), that an appeal from this decision could not be taken in good faith, and that there is no basis upon which to issue a certificate of appealability. 28 U.S.C. § 2253(c); Fed.R.App.P. 22(b).

IT IS SO ORDERED.

Dated: 9/10/14

/s/ Patricia A. Gaughan
PATRICIA A. GAUGHAN
United States District Judge